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In the

Supreme Court of the United States

October Term, 1960

No. 201

Thomas Akel,

Petitioner,

—against—

State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

THOMAS AKEL,

Petitioner,

—against—

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on March 24, 1960. 7 N. Y. 2d 998, 199 N. Y. S. 2d 510.

OPINIONS BELOW

No opinions were rendered either by the Trial Court, or by the Appellate Division, Second Judicial Department, or by the Court of Appeals of the State of New York. 9 A. D. 2d 780, 193 N. Y. S. 2d 95; 7 N. Y. 2d 998, 199 N. Y. S. 2d 510. The appendix annexed hereto contains opinions below.

JURISDICTION

The judgment of the New York State Court of Appeals was pronounced on the 24th day of March, 1960, and an order extending the time to file the within petition for certiorari was extended to and including July 22, 1960 by Associate Justice of United States Supreme Court, JOHN M. HARLAN, on June 23d, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. A. §1257(3).

The following cases are believed to sustain jurisdiction:

Benanti v. *United States*, 355 U. S. 96;
Nardone v. *United States*, 302 U. S. 379;
Pugach v. *Dollinger*, 277 F. 2d 739; cert. granted on June 27, 1960, 80 S. Ct. 1614.

QUESTIONS PRESENTED

1. Whether evidence obtained by interception of telephone communications was illegal and in violation of the Federal Communications Act of 1934, 47 U. S. C. A. §605.

2. Whether petitioner's constitutional right to due process under the Fourteenth Amendment was invaded despite the Supremacy Clause, Article VI, Clause 2, United States Constitution and the Sixth Amendment.

PROCEDURAL HISTORY OF THE CASE

On February 11, 1958, petitioner was sentenced by the County Court of Kings County (JOYCE, *J.*), to a term of two and one-half to five years as a first felony offender following his conviction by jury of the crime of being an Accessory to a Felony (P. L. §2).

Petitioner's contention here is that the introduction at his State trial of evidence obtained by the use of wiretaps, authorized under New York Code of Criminal Procedure §813a, constituted a violation of the provisions of the Federal Communications Act (47 U. S. C. A. §605).

Following his conviction, petitioner appealed to the Appellate Division, Second Department, which affirmed without opinion (*People* v. *Akel*, 9 A. D. 2d 780, 193 N. Y. S. 2d 95) but referred petitioner to (*People* v. *Maimone*, 9 A. D. 2d 780, 193 N. Y. S. 2d 90), a co-defendant. Leave to appeal to the New York State Court of Appeals was granted and that Court also unanimously affirmed without opinion on March 24, 1960 (*People* v. *Akel*, 7 N. Y. 2d 998, 199 N. Y. S. 2d 510).

In petitioner's brief to the Court of Appeals, the contentions presented to this Court were not raised. Rather, the brief there concerned itself with alleged errors i.e.:

a) The People failed as a matter of law to prove each and every essential element of the offense of being an accessory to a felony; and

b) That the evidence adduced failed to controvert the presumption of innocence beyond a reasonable doubt; and

c) That he failed to receive a fair and impartial trial as guaranteed by the due process clauses of the Constitutions.

On application for admission to bail, to the State Court of Appeals, pending certiorari before this Court, petitioner's newly retained counsel, Frances Kahn, Esq., questioned the propriety of the wiretaps and the absence of petitioner's trial counsel during the People's summation. Hon. Judge Stanley H. Fuld denied bail pending certiorari.

Following the affirmance by the Court of Appeals, petitioner surrendered to commence service of his sentence in State Prison at Auburn, New York, where he is presently confined. While petitioner did not move the whole Court of Appeals to amend its *remittitur* to show that the alleged illegality of the use of wiretap evidence had been considered and passed upon by it, the federal question was presented to Associate Judge Fuld. The application for a writ of certiorari to the United States Supreme Court followed.

FACTS MATERIAL TO THE QUESTIONS PRESENTED

The wiretaps assailed herein may be found at pages 1020, 1022, 1023, 1024 and 1025, received in evidence as "People's Exhibits 7A, 7B, 7C, 7D and 8A" in the printed Record on Appeal before the New York State Court of Appeals. To bolster these wiretaps the People placed a movie film, taken at the Albany-Schenectady Airport, in evidence as "People's Exhibit 37" (page 1176 of printed Record).

Petitioner was arrested and charged with the crime of attempting to harbor the chief prosecution witness, one Joseph Basile, but instead thereof, the real issue became beclouded at the trial when the People and its witnesses repeatedly interjected narcotics and other similar narcotic transactions in their successful efforts to befuddle the jury. As the evidence unfolded, it became crystal clear to the minds of the jurors that the keynote was narcotics instead of harboring a fugitive. It was the theory of the People that the successful continuance of their chief prosecution witness' trafficking in narcotics would be used as a springboard to portray that narcotics sired the plot to harbor.

When the People's main witness, Joseph Basile, indicated his willingness to cooperate with the prosecution officials, it was readily observed that they had on their hands the vile culprit Basile really is. Next the prosecutor sought

out the persons named by Basile and made wiretap after wiretap of the aforesaid telephonic conversations (People's "Exhibits 7A to 8A" inclusive, *supra*) all of which was subsequently used at the state trial of petitioner to convict petitioner herein. The affidavit in opposition, verified by assistant district attorney William Sonenshine, Esq., on petitioner's application to fix bail pending certiorari, contained the following statement by said prosecutor:

> "We go one step further. Nowhere in the record itself (which encompassed 1801 printed pages) was there any evidence of wiretapping." (Bail denied, see Appendix.)

Of course, reference to these wiretaps may be found in the Index of the printed Record. There is, was, and always will be evidence of wiretapping in the instant case, notwithstanding the disclaimer of such wiretaps by the prosecutor.

Turning now to the violation of petitioner's right to counsel under the Sixth Amendment, we respectfully submit that an accused is entitled to the presence and assistance of counsel at every stage of the trial. It was substantial error to proceed with the trial in counsel's absence, for the petitioner was thereby prejudiced. Counsel for petitioner at the trial proceedings was Samuel Bonom, Esq. After a short recess during the afternoon session on December 3rd, 1957, the trial was resumed. Assistant District Attorney Kottler continued summing up to the jury on behalf of the People. (See ff. 4824-4911, page 1608 including a colloquy between other counsel, the prosecution and Court.) At these proceedings, petitioner's trial counsel was absent. The record is fortified when we consider the following remark by counsel, folio 4916, page 1639 of Record:

> "Mr. Bonom: I have been asked by Mr. Alexander to have his, of course, added to those that were made yesterday to all phases of the proceedings, *and add mine as well.*" (Italics supplied.)

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE AN IMPORTANT QUESTION AFFECTING WIRETAPPING AS UNCONSTITUTIONAL IN THE STATE COURTS AND THE RIGHTS OF PETITIONER UNDER THE FOURTEENTH AMENDMENT ARE INVOLVED.

The wire-tapping evidence thus obtained was highly prejudicial against petitioner in the course of his trial. The New York State Court of Appeals has already passed on this question and has ruled that even though this procedure might violate the Constitution of the United States and the laws of the United States, still it would be admitted in evidence in the New York Court.

It is, therefore, apparent that the issue is crystal-clear and must now be resolved by the Supreme Court of the United States.

In *Nardone* v. *U. S.*, 302 U. S. 379, at page 383, the United States Supreme Court stated as follows:

> "The answer to the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that the officers should resort to methods, inconsistent with ethical standards and destructive of personal liberty."

From the foregoing, it is apparent that Congress set forth difficult standards for the whole people of the United States, including the people of the State of New York. There are no exceptions. In the second *Nardone* case, *Nardone* v. *U. S.*, 308 U. S. 338, at page 341, the Supreme Court stated as follows:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that merely the evidence shall not be used before the Court, but that it shall not be used at all.

"A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose."

This language cannot be misinterpreted. Congress in passing §605 of the Federal Communications Act did not intend to pass a law that was *self-defeating*. To permit the State of New York, or any other state, under the guise of evidentiary rules to violate this law with impunity would amount to nullification or destruction of the "ethical standards" established by Congress, as representatives of our Federal Government and all of its people.

Benanti v. *U. S.*, 355 U. S. 96, declared that state officers acting pursuant to a warrant of a state court were, nevertheless, guilty of violating §605 of the Federal Communications Act if they tapped a telephone and divulged a conversation, without the express permission of the sender.

Benanti went further and held, "that Congress setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."

In effect, Benanti stands for the proposition that "no persons", as stated in §605 of the Federal Communications Act, means exactly what it says and makes no exception, whether that be State Police, District Attorney, or even members of the Judiciary.

It must also be borne in mind that under our Federal laws, anyone who aids and abets in the violation of a federal law becomes a principal and can be charged with that crime. Is this not a sad spectacle to observe police officers, district

attorneys and even judges becoming participants to a crime against the United States! This would lead to disrespect of our laws and our courts.

Benanti also stands for the proposition that the State laws permitting wire-tapping are unconstitutional, in that Congress "did not mean to allow state legislation which would contradict that section and that policy."

It has often been said that ours is a "government of laws and not men". Yet, from the history of Section 605 of the Federal Communications Act, there has never been a prosecution of any member of the Police Department or other state official who violated this law. It is common knowledge that this section is being violated almost every day in New York State. The agents of the Federal Government in charge of enforcing Federal laws are aware of this, yet, no one has ever been prosecuted. Could it be that those in charge of enforcing Federal laws do not approve of this law? If that were so, then they are derelict in their duties, as non-enforcement amounts to nullification of that law by failure to enforce it.

It has often been said that law is not static, but a living organism that grows to meet the challenge of changing times.

Certiorari is sought on the grounds that the New York State Court of Appeals has rendered a decision on an important question of Federal law in conflict with applicable decisions and controlling case law; has decided an important question of Federal law which should be clarified and made more definite and certain by this Court; has decided a Federal question of substance not therefore determined by this Court; has decided said question in a way probably not in accord with the applicable decisions of this Court and with other Circuits; and or because of the importance of

the question for the administration of criminal justice in the Federal Courts.

Recently the United States Supreme Court confirmed the position in *United States* v. *Benanti*, *supra*, that the New York statute and Constitutional provision that permits wiretapping is a violation of and in conflict with the paramount power of Congress in that field. The Congress of the United States has recognized that the evil of wiretapping is an invasion of the privacy of persons, and that it is an evil for such an invasion to exist.

Although the highest Court of the land has declared the New York Law conflicts with paramount Federal law, nevertheless wiretapping persists in New York State. Undoubtedly, those who engage in violating the Federal statute do so because the *Defore* rule in New York (*People* v. *Defore*, 242 N. Y. 13, *infra*), as recently reaffirmed with respect to wiretapping in *People* v. *Variano*, 5 N. Y. 2d 391, encourages the violation of law by law-enforcement officers, for the Courts in New York will not pause to inquire into the manner evidence was obtained.

The search has therefore turned toward discovering a remedy that will enforce compliance with Federal law. None has effectively succeeded. *Hoffman* v. *O'Brien*, 88 F. Supp. 490; *Black* v. *Impelliterri*, 201 Misc. 371; affirmed 281 A. D. 671; appeal dismissed, 305 N. Y. 724 (a taxpayer's action against municipal officials to enjoin the use of public funds for wiretap equipment and personnel); *People* v. *Variano*, *supra*, an attempt to exclude such evidence in a criminal trial, which if successful would have been some means of discouraging wiretapping, although it would have left open the use of secret interceptions to gain leads.

The present petition for certiorari is brought with that background. The paramount Federal law is openly flouted

under the dubious authority of State law, yet no remedy exists to stop it. It is worth no more than mention that the federal provision for prosecution of violators and actions for damages are illusory.

Therefore, the present petition for certiorari presents a feasible solution for at least preventing the use of the evidence in a State trial against the person whose privacy had been illegally invaded. Although it will not stop unlawful wiretapping as a community problem, it will serve to discourage its rampant use. An aroused judiciary with full knowledge that federal law is violated should be inspired to take every measure to vindicate federal law.

The only argument that might be urged against the exercise of power by this federal court is that the federal system requires diffidence by federal courts (for example, *Stefanelli* v. *Minard*, 342 U. S. 117). But is this the answer? Must the federal courts back away from enforcing its own laws because the State was involved in a trial at which illegal wiretaps were introduced? Suppose the federal government had prosecuted a State official for violating the federal law against wiretapping in this case, wouldn't this be a "disrespect" of "the proper balance between the States and the federal government in law enforcement"? Indeed, such prosecution at this very stage, at this very date, would be as much intrusion by the federal government as would be an injunction. Yet no one would argue that such prosecution could not lie. See, *Ex parte Royall*, 117 U. S. 241, 251; *Boske* v. *Comingore*, 177 U. S. 459.

If the objection is interference with State prosecutions, the answer is that there is no more interference with State sovereignty before a trial than it is after a trial, such as illustrated by a habeas corpus proceeding to review State action, as found in *Lopez* v. *Denno*, 347 U. S. 556. At least,

the federal judge is enforcing federal law which happens to be paramount in this case. The enforcement of the paramount law should take precedence irrespective of the niceties which go with formalities. Jurisdiction can be supported on the broader ground that the federal courts have power to enforce paramount federal law; and that all other considerations are secondary. *Ex parte Rowall, supra; Rea v. United States*, 350 U. S. 214, where a federal officer was enjoined from using wiretap evidence in a State prosecution.

Until recently, the several states were clearly within their rights if they chose to permit their law enforcement officers to make use of wiretapping evidence in obtaining convictions. Within the limits of the Fourteenth Amendment the states alone have the authority to regulate police matters and formulate rules of evidence for their courts (*Schwartz v. Texas*, 344 U. S. 199 (1952); *Rochin v. California*, 342 U. S. 165 (1952); *Wolf v. Colorado*, 338 U. S. 25 (1949); *Palko v. Connecticut*, 302 U. S. 319 (1937); *Twining v. New Jersey*, 211 U. S. 78 (1908); *People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926), cert. denied, 270 U. S. 657 (1925)). New York by constitutional amendment in 1938 guaranteed the privacy of wire communications, but provided for interceptions by police officers where an *ex parte* court order had been obtained for the purpose. (N. Y. Const. art. I, § 12, ¶ 2.) Thereafter, the legislature provided a procedure for obtaining the court orders (N. Y. Code Crim. Proc. § 813-a), and made it a misdemeanor for an individual to possess wiretapping equipment with the intention of using it for unauthorized wiretaps (N. Y. Penal Law § 552(a)).

The decision of the United States Supreme Court in *Benanti v. United States*, *supra*, places the wiretapping statutes of the several states under a cloud. The Supreme

Court reversed, holding that section 605 of the Federal Communications Act which states,

> " . . . [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person. . . . "

precludes the use in a federal prosecution of wiretap evidence even where obtained by state officers pursuant to state law. Going further, the Court said in reference to the New York provisions for police wiretapping "Congress . . . did not mean to allow state legislation which would contradict that section and that policy." (355 U. S. at 105.) Taken on its face, this would seem to bar state legislation that goes beyond the federal statute (U. S. Const. art. VI, cl. 2).

It was this consideration that led Justice Hofstadter of the New York Supreme Court to refuse to entertain any further applications for wiretap orders under §813-a of the New York Code of Criminal Procedure (*Matter of Interception of Telephone Communications*, 170 N. Y. S. 2d 84, 9 Misc. 2d 121 (Sup. Ct. N. Y. County 1958).

No conviction is so important that a reviewing Court will countenance a trial permeated with substantial federal questions and errors to which petitioner was subjected below. The Record consists of three volumes, thus an appendix is submitted herewith in lieu thereof.

Apropos to add that the same Appellate Division reversed a conviction for permitting the admission into evidence of wiretap records and transcripts which took place after the commission of the crime for which two men were indicted. (See *People* v. *Hulsen and Weber*, New York Law Journal, July 21, 1960, page 7, column 1.)

II.

CERTIORARI SHOULD BE GRANTED BECAUSE AN IMPORTANT QUESTION AFFECTING VIOLATION OF THE RIGHT TO COUNSEL UNDER THE FOURTEENTH AMENDMENT IS INVOLVED.

In the absence of waiver of the right to counsel, petitioner is entitled to the presence and assistance of retained counsel at every step and stage of the trial. See 23 C. J. S. §§979-980, U. S. C. A. Const. Amend. 6. Thus, it has been held to be error for the Court, in the absence of counsel, to proceed with the trial, unless proper diligence was used to have counsel present. *Humann* v. *Rivera*, 71 N. Y. S. 2d 321, 272 App. Div. 352; §356 Code C. Proc. N. Y. It was the district attorney's duty to call Court's attention to the absence of petitioner's retained counsel when the prosecutor summed up to the jury in behalf of the People. *Commonwealth* v. *Jester*, 100 A. 993, 256 Pa. 441, reversing 63 Pa. Super. 291. A failure by petitioner to object was held not to be a waiver. *U. S.* v. *Simone*, C. A. N. Y., 205 F. 2d 480.

During the prosecutor's summation, his statements to the jury were of a highly inflammatory nature and seriously prejudicial to petitioner. At the conclusion of the summation, counsel for the co-defendants strenuously objected to this summation and asked for mistrials for their clients. Counsel for petitioner was absent and the record is devoid of any objection made by any other counsel in petitioner's behalf. The Court, in the jury's presence at that time (ff. 4901-4902; page 1634) erroneously stated that petitioner was accused of being an accessory to the crime of "violation of the narcotics law." The Court there further misstated that petitioner was accused of being an accessory to the crime of "violation of the narcotics law."

The prosecutor intermittently dangled the narcotics, belonging to the People's star witness, before the eyes of the

jury during the course of his summation. The prosecutor opened People's Exhibit One, consisting of Joseph Basile's narcotics, and remarked that petitioner and co-defendants are tarred with the same narcotics. Petitioner was compelled to sit idly by while the district attorney employed other misleading and inflammatory devices to destroy petitioner's credibility in his successful attempt to obtain a conviction. Had counsel for petitioner been present at the colloquy subsequent to the prosecutor's summation and prior thereto, appropriate objection and timely exception could have been made which may have prevented the adverse findings and the rendition of judgment. The prejudice resulting from the absence of counsel in the instant case constituted reversible error. Absence of counsel at any stage is as serious a reflection on the standards and discipline of the Court as it is on the character and attitude of the attorney concerned.

One line of decisions holds that counsel must be present at every stage, and deems it error when the Court proceeds without counsel. *State* v. *Beeny*, 115 Utah 168, 203 P. 2d 397 (1949), judge failed to reinstruct jury because of counsel's absence; *State* v. *Davenport*, 33 La. Ann. 231 (1881), judge charged jury in absence of counsel; *Lee* v. *State*, 244 Ala. 401, 13 So. 2d 590 (1943), counsel absent at verdict; *U. S. ex rel. Hall* v. *Ragen*, D. C. Ill., 60 F. Supp. 820; *Wagner* v. *U. S.*, C. A. Ala. 171 F. 2d 354, cert. den. 69 S. Ct. 1499; *Petition of Ellison*, D. C. Tex., 140 F. Supp. 720, affd., C. A. 239 F. 2d 175.

That petitioner's constitutional rights under the Fourteenth Amendment and the Sixth Amendment were violated. The latter Amendment provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED FOR THE REASONS RELIED ON HEREINBEFORE.

Dated: July 21, 1960.

Respectfully submitted,

FRANCES KAHN
Member of the Bar
of the Supreme Court
of the United States
Attorney for Petitioner
401 Broadway
New York 13, New York

APPENDIX

Judgment

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 11th day of February, 1958.

Present:

HON. GEORGE J. JOYCE,

County Judge.

Indictment #1445/1957

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

THOMAS AKEL
Alias "Brooklyn Tommy"
Alias "Brooklyn Kid"
Alias "Thomas Dorio"

Indicted for Accessory to a Felony, Section 2 of the Penal Law, and convicted thereof as charged by the verdict of a jury.

Being personally present and sworn says:

My true name is Thomas Akel; I am 22 years of age. I was born in New York City; I reside at 161 State St., B'klyn; I am a salesman; I am not married, I can read and write, I have an 8th grade elementary school educa-

tion; I am a Catholic regular attendant; my parents are dead; I am temperate. I have previously been convicted of two misdemeanors; I do not use drugs.

Being asked and he having nothing to say why the judgment of the law should not be pronounced against him, the Court pronounced Judgment as follows:

Whereupon, it is Ordered and Adjudged, by the Court, that the said Thomas Akel, alias "Brooklyn Tommy", alias "Brooklyn Kid" alias "Thomas Dorio" for the felony aforesaid whereof he is convicted be imprisoned in the Sing Sing State Prison at Ossining, N. Y., at hard labor, under an indeterminate sentence, the maximum of such imprisonment to be five (5) years and the minimum thereof two (2) years and six (6) months.

A True Extract from the Minutes

JOSEPH B. WHITTY
Clerk

Appellate Division Opinion

(193 N. Y. S. 2d 95)

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

THOMAS AKEL, alias "BROOKLYN TOMMY," alias "BROOKLYN KID," alias "THOMAS DORIO,"

Appellant.

Supreme Court, Appellate Division, Second Department.
Nov. 16, 1959.

EDWARD H. LEVINE, New York City, *for appellant Akel.*
VERNON C. ROSSNER, New York City, *of counsel.*

EDWARD S. SILVER, Dist. Atty., Brooklyn, *for respondent,*
WILLIAM SONENSHINE, Brooklyn, *of counsel.*

Before:

NOLAN, *P.J.*, and
WENZEL, BELDOCK, MURPHY and UGHETTA, *JJ.*

MEMORANDUM BY THE COURT

Appeal from a judgment of the County Court, Kings County, rendered February 11, 1958, sentencing appellant to serve from 2½ to 5 years, after he had been found guilty by a jury of being an accessory to a felony (Penal Law, §2). The notice of appeal states that appeal is also taken from

"all of the objections, exceptions and motions made during the trial, after trial, and from all intermediate orders made in this matter."

Judgment unanimously affirmed. See People v. Maimone, App. Div., 193 N. Y. S. 2d 90.

No separate appeal lies from the objections, the exceptions or the intermediate orders, which have been reviewed on the appeal from the judgment of conviction.

Appellate Division Opinion

(193 N. Y. S. 2d 90)

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

SAVERIO MAIMONE, alias "SALVATORE MARVONE," alias "SIBBIE,"

Appellant.

Supreme Court, Appellate Division, Second Department.
Nov. 16, 1959.

EDWARD H. LEVINE, New York City; VERNON C. ROSSNER, New York City, *of counsel, for appellant Maimone.*

EDWARD S. SILVER, Dist. Atty., WILLIAM SONENSHINE, Brooklyn, *of counsel, for respondent.*

Before:

NOLAN, *P.J.*, and
WENZEL, BELDOCK, MURPHY and UGHETTA, *JJ.*

MEMORANDUM BY THE COURT

Appeal from a judgment of the County Court, Kings County, rendered April 22, 1958, sentencing appellant to serve from 2½ to 5 years, after he had been found guilty by a jury of being an accessory to a felony (Penal Law, §2).

Judgment unanimously affirmed.

[1-3] Appellant, Thomas Akel, Salvatore Giordano, Robert Douglas Williams and five others were indicted for being accessories to a felony (Penal Law, § 2) in that, after one Basile had committed the felony of unlawfully possessing narcotic drugs, appellant and his codefendants, acting in concert and aiding and abetting each other and pursuant to a common plan or scheme, harbored, concealed and aided Basile with intent that he might avoid and escape from arrest, trial, conviction and punishment, with knowledge and reasonable grounds to believe that Basile had committed said felony. Under the charge of the court, to which there was no exception and which thus was the law of the case, the evidence was sufficient to justify the finding implicit in the jury's verdict that Basile, the principal witness against appellant and his codefendants, was not an accomplice. His testimony, therefore, did not require corroboration as provided by section 399 of the Code of Criminal Procedure and the proof was sufficient to sustain the verdict.

[4-6] Considerable evidence was received, as to transactions between Basile and the defendants other than appellant, involving the illegal possession and sale of narcotics. There was no claim that appellant took any part in such transactions or even had any knowledge of them. This evidence was properly received as against those defendants who were directly connected with these transactions, even though such transactions had no relation to the felony as to which such defendants were accused of being accessories, since it tended to establish as against them that they were busily engaged with Basile in the traffic in narcotics and had a motive for aiding him to escape capture and prosecution for the original felony which he had committed, so that their business relations with him might continue (cf. People v. Molineux, 168 N. Y. 264, 294, 61 N. E. 286, 295, 62 L. R. A. 193, People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846) and

also tended to establish the means by which they aided Basile to remain at large. It was for the jury to determine, under the charge of the court, to which there was no exception, whether this evidence could be considered against appellant as proof of a continuing conspiracy, originated by appellant and others, to harbor and aid Basile, even though appellant did not know of all of the details of the acts committed during the conspiracy, or the identity of all of his co-conspirators. Moreover, most of the evidence now complained of was admitted without objection, and, although some immaterial and irrelevant evidence as to the details of the narcotics traffic was improperly admitted over objection, it was no more prejudicial to appellant's rights than the other evidence to which no objection was made. It was not error, under the circumstances here disclosed, to refuse to accept the concession tendered by appellant and a codefendant, that Basile had committed the felony charged in the indictment and to permit proof thereof by the People. The record does not clearly establish that the concession was offered on behalf of all defendants, and in any event appellant appears to have acquiesced in the trial court's ruling. The concession was offered only for the purpose of saving time, and no objection was made to proof that Basile had committed the felony, on the grounds that it was immaterial and unnecessary in view of the concession. Comments by the prosecutor in summing up that Basile's testimony was uncontradicted and unimpeached were improper, since much of that testimony could not have been contradicted unless appellant had testified in his own defense (cf. People v. Watson, 216 N. Y. 565, 111 N. E. 243; People v. Forte, 277 N. Y. 440, 14 N. E. 2d 783; People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846, supra; People v. Minkowitz, 220 N. Y. 399, 115 N. E. 987). However, the trial court correctly and satisfactorily charged the provisions of section 393 of the Code of Criminal Procedure. That being so, it is

our opinion, although we do not condone the prosecutor's conduct, that reversal is not required, in view of the fact that appellant's guilt was clearly established (People v. Watson, supra, 216 N. Y. at pages 569-570, 111 N. E. at pages 244-245; People v. Priori, 164 N. Y. 459, 58 N. E. 668; Code Crim. Proc. §542).

Court of Appeals (No Opinion)

(7 N. Y. 2d 998, 199 N. Y. S. 2d 510)

PEOPLE, etc.,

Respondent,

—v.—

THOMAS AKEL, etc.,

Appellant.

PEOPLE v. MAIMONE

Court of Appeals of New York
March 24, 1960

Appeal from Supreme Court, Appellate Division, Second Department, 9 A. D. 2d 780, 193 N. Y. S. 2d 90, 94, 95; 9 A. D. 2d 784.

Defendants were charged by indictment with being accessories to a felony in that after felonious possession of narcotics by narcotics peddler, the defendants, acting in concert, and aiding and abetting each other, harbored, concealed, and aided narcotics peddler with intent that he might avoid and escape arrest, trial, conviction and punishment.

The defendants were convicted under Section 2 of the Penal Law, Consol. Laws, c. 40, of being accessories to a felony. The County Court, Kings County, Joyce, J., entered judgment, and the defendants appealed.

The Appellate Division affirmed the judgment.

The defendants appealed to the Court of Appeals. The defendant Akel contended in the Court of Appeals that

the People failed as a matter of law to prove each and every essential element of the offense of being an accessory to a felony, and that evidence adduced failed to controvert defendant's presumption of innocence beyond a reasonable doubt, and that defendant failed to receive a fair and impartial trial guaranteed by Section 6 of Article 1 of the state Constitution. The defendant Giordano contended in the Court of Appeals that the County Court erred in denying his motion to dismiss the indictment and in denying his motion for a directed verdict, and that admission of evidence of crimes not charged in the indictment denied him a fair trial in violation of the due process clause of the Fourteenth Amendment to the federal Constitution, and that erroneous rulings of the County Court denied him a fair trial, and that allegedly unfair comment and allegedly unfair trial tactics of the prosecutor denied him a fair trial, and that his motion for new trial should have been granted. The defendant Williams contended in the Court of Appeals that the County Court erred in failing to direct a verdict of acquittal for him, and that evidence was insufficient to support jury's finding that he was part of a single continuing conspiracy, and that he was deprived of his constitutional right to a fair trial. The defendant Maimone contended in the Court of Appeals that he was deprived of a fair trial by the admission of highly prejudicial and inflammatory details concerning the narcotics traffic and by the prosecutor's remarks, and that the evidence was insufficient to sustain the conviction, and that narcotics peddler was an accomplice as a matter of law and that County Court should have so ruled.

Judgments affirmed.

All concur.

Extracts of Wiretap Testimony in Kings County Court (ff. 3056-3074)

Mr. Kern: May I then take my exception for the record?

The Court: The rulings will be the same.

Mr. Bonom: And the same exception as far as the defendant Akel is concerned.

The Court: I have an Exhibit 7 for identification and my notes show it is a tape recording, Sacramento 2-7421. That is all I have here. That is all I was told at the time it was offered.

Mr. Kottler: That's right.

The Court: What are you talking about 7A or 7B?

Mr. Kottler: Well, at this time I offered in evidence a transcript of a conversation on that tape which is 7 for identification.

The Court: Yes.

Mr. Kottler: And pursuant to stipulation between the prosecutor and the counsel for the defendants, we have agreed that these conversations are to go into evidence and the first conversation to go in is the one, the copy of which was just handed to your Honor.

The Court: And you are calling that 7A.

Mr. Kottler: 7A in evidence.

The Court: All right.

Mr. Kottler: Which is a conversation held between June 2, 1956 and June 4, 1956, on that telephone number between the defendant Sam Barone and the wife of defendant Giordano.

The Court: All right.

(Transcript of conversation between Sam Barone and Mrs. Giordano marked People's Exhibit 7A in evidence.)

Mr. Kottler: Let the record also show that we prepared mimeographed copies which are exact of this transcript which I have been handing to the jury.

The Court: That's right, and the attorneys.

Mr. Kottler: And the attorneys for the defendants.

(Exhibit 7A played, as follows:

"Incoming call MO (Sam) to FI (Joan)

"FI Hello.

"MO Hello is Jimmy there?

"FI No who is this?

"MO This is er—Sam you know (inaudible.)

"FI Sam who?

"MO Sam, you know Sam.

"FI Oh Sam.

"MO Yea.

"FI Ah of course dear, you were supposed to see him or something.

"MO Yea.

"FI Tonight?

"MO Yea.

"FI Because he told me he wasn't coming right home. He must have meant he was going to meet you.

"MO Well if he calls you, tell him I'll be there in about an hour.

"FI That you won't be there until an hour?

"MO I'll be there in about an hour, I mean . . .

"FI You mean you'll be there, you're there now?

"MO No, I've . . .

"FI Oh I see; you won't be there until an hour, I see and he knows everything, huh.

"MO Yea, he knows where.

"FI Now look dear, if he doesn't . . .

"MO Well then, he must be there.

(Exhibit 7A continued to be played:

"FI Oh alright, so if not you call in the morning, eh.

"MO No, I've got to call, I've got to see him tonight.

"FI Alright dear, then he'll be . . .

"MO I've got to see him as soon as possible.

"FI Alright then, I'm quite positive he must be there.

"MO Okay.

"FI See because . . .

"MO If he calls you, tell him that I'll be there.

"FI If he calls you, I'll tell him you'll be there in an hour.

"MO Yea.

"FI Alright dear.

"MO Okay.

"FI Bye bye.

"MO Bye bye.

(Exhibit 7A was played to the jury.)

Mr. Kottler: At this time, if the Court pleases, pursuant to stipulation, and with regard to the same Exhibit 7 for identification, I offer in evidence a conversation from that exhibit which took place between June 2, 1956 and June 4, 1956, between Joe Basile and the wife of defendant Giordano, on that telephone number Sacramento 2—whatever that number is.

The Court: 7421.

Mr. Kottler: 7421. This is 7B in evidence.

(Conversation between Joe Basile and Mrs. Giordano marked People's Exhibit 7B in evidence.)

Mr. Cooperman: I merely want to state that in my stipulation I consented that these conversations were held

between the parties set forth in this exhibit. That is all I am conceding.

The Court: Without conceding the truth of it.

Mr. Cooperman: I am also not conceding it is binding on my defendant.

Mr. Kottler: But you are conceding Joan is the wife of the defendant Giordano.

Mr. Cooperman: That's right. That's all I concede.

(Tape recording played back.)

Mr. Kottler: I think the record should show that the transcript seems to be inaccurate in that the two words, "Hello, hello," are missing at the very beginning of it.

I now offer in evidence as People's Exhibit 7C a transcript of a conversation on the tape which is People's Exhibit 7 for identification. And this conversation took place between June 2nd and June 4, 1956, between the defendant Barone and the wife of defendant Giordano.

I ask that this be marked 7C in evidence.

(Conversation between Barone and Mrs. Giordano marked People's Exhibit 7C in evidence.)

(Tape recording played back:)

Mr. Cooperman: Now, if the Court pleases, my client informs me in hearing this telephone conversation, alleged telephone conversation, that the party on the wire being the "Female In," is not his wife, Joan.

The Court: All right. We will come to that in time, maybe.

Mr. Kottler: I now offer in evidence also with regard to People's Exhibit 7 for identification, a transcript of a conversation on that reel between defendant Barone and the

defendant Giordano, on Sacramento 2-7421, between June 2, 1956 and June 4, 1956, and I ask that this be marked People's Exhibit 7D in evidence.

(Transcript of conversation between Barone and Giordano marked People's Exhibit 7D in evidence.)

Mr. Kottler: That's between Joan and Giordano.

(Tape recording played back.)

Mr. Kottler: Now, with regard to People's Exhibit 8 for identification, I offer into evidence a transcript of a conversation on that reel, People's Exhibit 8 for identification between the witness Basile and the wife of the defendant Giordano, and I ask that it be marked People's Exhibit 8A in evidence.

(Transcript of conversation between Basile and Mrs. Giordano marked People's Exhibit 8A in evidence.)

Mr. Cooperman: Again, if the court pleases, may I note for the record that all we conceded was that such conversation did take place, on the telephone; that any conversation with the wife of the defendant is not binding on the defendant Giordano.

The Court: Denied.

Mr. Cooperman: Exception.

(People's Exhibit 8A in evidence played back.)

Extract of Statement Taken of Anthony DeGesaro Received in Evidence and Marked "People's Exhibit 35"

"Q. What is your name? A. Anthony DeGesaro.

"Q. Did you receive a phone call from New York this week? A. Yes.

"Q. Can you describe that phone call? A. A person called.

"Q. What was that person, a man or a woman? A. To me it sounded like a woman's voice. She said she was Joe's sister.

"Q. By Joe, whom did you consider that to mean? A. Joe DeJohn, that is the name I knew him by which later turned out to be an alias.

"Q. Did you subsequently learn him to be Joe Basile? A. Yes.

"Q. How did you find that out? A. From the newspapers.

"Q. How many phone calls did you get from New York this week? A. Two or three.

"Q. Was it two or was it three? A. I don't know. It could have been two or it could have been three, but I think it was closer to three.

"Q. All from the same person? A. Supposed to be, it sounded like the same person.

"Q. As a result of these conversations, did you go to the Albany-Schnectady Airport today? A. Yes, sir.

"Q. What happened then? A. Some fellow showed me a badge and said go against the wall and then he checked me to see if I was carrying any weapons and firearms.

"Q. Did he then take you to this office? A. Yes.

"Q. That is, the District Attorney's office? A. Yes."

Extract of Statement of Sam Barone Received in Evidence and Marked "People's Exhibit 36"

"Q. What is your name? A. Salvatore Barone.

"Q. Do you know Anthony DeGesaro? A. Yes.

"Q. Did you see or speak to DeGesaro on Monday night, June 17th, 1957? A. Yes, I did.

"Q. What conversation did you have with him? A. Nothing, just about a phone call that I got from New York.

"Q. What phone call did he say he got from New York? A. Said he got a phone call from Joe Basile's sister.

"Q. What was said? A. She asked him for the clothes so I told him when she calls back for him to come up and get them."

Memorandum by Mr. Justice Frankfurter

THOMAS AKEL,

Petitioner,

—v.—

STATE OF NEW YORK.

ON MOTION FOR BAIL

This is a motion to fix bail pending a petition for certiorari to be filed seeking review of a judgment of conviction affirmed in the Court of Appeals of New York on March 24, 1960.

When a judge as solicitous as is Judge Stanley H. Fuld to safeguard the interests of defendants in criminal cases denies an application for bail pending a proposed petition for certiorari to this Court on a claim of a substantial federal right, one naturally attributes some solid ground for such denial. To me this is found in the opposing affidavit in which it is deposed that at no time in the course of this prosecution was a claim of a federal nature made, that the New York Court of Appeals did not certify that any federal question was presented to it, and that, although affirmance of the judgment of conviction was rendered on March 24 last, the remittitur below has not been amended so as to show that in fact a federal claim was considered and rejected by the New York Court of Appeals. While the petition for admission to bail claims that a federal question is to be raised by a proposed petition for certiorari, it does not allege that such a federal question had been raised before the New York Court of Appeals and was

there denied. Nor is there any claim that the remittitur was amended so as to set forth that the Court of Appeals did in fact pass on the federal claim. Nor does the memorandum of the Court of Appeals affirming the conviction, 7 N. Y. 2d 998, 999, in setting forth the arguments made by defendant Akel in that court, include the claim of a federal right.

In this state of the record before me I am compelled to deny bail pending the filing of a petition for certiorari.

FELIX FRANKFURTER
Associate Justice,
Supreme Court of the United States

July 19, 1960